

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

GILDARDO RODRIGUEZ,

Plaintiff,

vs.

RICK HILL, et al.,

Defendant.

CASE NO. 13cv1191-LAB (DHB)

**ORDER ADOPTING REPORT  
AND RECOMMENDATION; AND**

**ORDER DENYING HABEAS  
PETITION**

Petitioner Gildardo Rodriguez, a prisoner in state custody, filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72, this matter was referred to Magistrate Judge David Bartick for report and recommendation. On July 7, 2014, Judge Bartick issued his report and recommendation (the "R&R"), which recommended denying Rodriguez's request for an evidentiary hearing and denying the petition. Rodriguez, after two extensions of time, filed his objections.

A district court has jurisdiction to review a Magistrate Judge's report and recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). This section does not require some lesser review by the district court when no objections are filed. *Thomas v. Arn*, 474 U.S. 140, 149–50 (1985). The "statute makes it clear that the district

1 judge must review the magistrate judge's findings and recommendations de novo *if objection*  
2 *is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.  
3 2003) (en banc) (emphasis in original).

4 The federal rules require specific written objections; generalized or blanket objections  
5 do not trigger the de novo review requirement. See *Bridgeman v. Stainer*, 2014 WL  
6 1806919, at \*1 (S.D.Cal., May 7, 2014) (citing Fed. R. Civ. P. 72(b)(2); *United States v.*  
7 *Midgette*, 478 F.3d 616, 621 (4<sup>th</sup> Cir. 2007)); *Marsden v. Moore*, 847 F.2d 1536, 1548 (11<sup>th</sup>  
8 Cir. 1988) ("Frivolous, conclusive, or general objections [to a magistrate judge's report and  
9 recommendation] need not be considered by the district court."). Objections that would not  
10 alter the outcome are moot, and can be overruled on that basis alone. *Haraszewski v.*  
11 *Brannan*, 2013 WL 4516776, at \*2 (S.D.Cal., Aug. 21, 2013 (citing *DeFunis v. Odegaard*,  
12 416 U.S. 312, 316 (1974))).

13 Although Rodriguez filed lengthy objections, the bulk of the document is merely a  
14 discussion of habeas standards which do not differ in any significant way from the standards  
15 Judge Bartick applied in the R&R. Many of the standards do not even have any application  
16 to this case such as the standards governing actual innocence claims (Obj. to R&R at 2:2-  
17 18), substantive due process claims (*id.* at 2:20–3:26), and denial of parole (*id.* at 4:10–5:8).  
18 A great deal of the remainder is taken up with a discussion of fundamental fairness, as well  
19 as the history of the writ and development of various doctrines concerning its issuance. The  
20 only portions of the objections with any real bearing on this case are a discussion of  
21 procedural default (*id.* at 8:27–9:26) and jury instructions (*id.* at 13:4–15:25.) The procedural  
22 default discussion mentions the "cause and prejudice" standard, but identifies no error in the  
23 R&R. The jury instruction discussion merely points out and discusses at length the familiar  
24 principle that the jury instructions may not be so defective as to permit a conviction on less  
25 than proof beyond a reasonable doubt. Although the objections conclude "Petitioner does  
26 not agree that the Magistrate Judge's opinion is a correct statement of the facts and the laws  
27 of Our Country," (*id.* at 15:26–27), the standards set forth in the objections that relate to  
28 habeas review are the same as those applied in the R&R.

1 The Court therefore holds that the objections Rodriguez filed do not trigger an  
 2 obligation to conduct a *de novo* review of the R&R. The Court has, nevertheless, reviewed  
 3 the jury instructions and procedural default analysis, because the objections identified those  
 4 as being defective.

5 There is no dispute that Rodriguez stabbed his wife to death. His defense, however,  
 6 was that his wife's verbal taunts (including an admission that she had been dating another  
 7 man) amounted to provocation, sufficient to permit the jury to find him guilty of voluntary  
 8 manslaughter rather than a more serious charge of first or second degree murder. The trial  
 9 court gave CALCRIM No. 570, the standard jury instruction on voluntary manslaughter based  
 10 on a "heat of passion" defense. (See R&R at 13–14 n.3 (text of instruction).)<sup>1</sup> The trial court  
 11 also gave CALCRIM No. 522, which instructed the jury that the weight of provocation was  
 12 for them to decide, and that it could reduce a murder to manslaughter. (See *id.* at 14 n.4  
 13 (text of instruction).) Rodriguez's attorney asked for a pinpoint instruction: "Provocation may  
 14 be based on a sudden and violent quarrel, verbal taunts by an unfaithful wife, and the  
 15 infidelity of a lover." The trial court found that reference to an "unfaithful wife" and "infidelity  
 16 of a lover" were argumentative, but considered whether to include a pinpoint instruction that  
 17 provocation could be either verbal or physical. In the end, the trial court decided not to give  
 18 a pinpoint instruction at all, but allowed defense counsel to argue that Rodriguez's wife's  
 19 taunts amounted to sufficient provocation to reduce culpability.

20 On review, the state courts determined that the instruction as given, and read together  
 21 with other instructions, adequately informed the jury that provocation could be verbal — or  
 22 that, even if it did not, the fact that defense counsel was allowed to make this argument  
 23 rendered any error harmless. This was a reasonable determination. The R&R correctly  
 24 states the standards for federal habeas review of claimed errors in state court jury  
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 27 <sup>1</sup> The R&R refers to this as an "involuntary manslaughter" instruction. The reference  
 28 to involuntary rather than voluntary appears to be a scrivener's error, because Rodriguez's  
 claim is that a properly-instructed jury would likely have convicted him only of voluntary  
 manslaughter and not of second degree murder. (See Lodgment 8 (Petition for Review to  
 California Supreme Court) at ii, 4–11.)

1 instructions. (R&R, 16:5–18:27.) Even assuming this was an error — and it does not appear  
2 it was — the claim falls far short of the standard for federal habeas relief.

3       The R&R, citing the state court decision on review, found Rodriguez’s second claim,  
4 regarding the permissible inference in CALCRIM NO. 852 was procedurally defaulted.  
5 Rodriguez’s claim is that when the trial court instructed the jury that it could infer Rodriguez  
6 was guilty of murder based on his prior acts of domestic violence, it also should have  
7 instructed the jury that the inference could also be applied to the lesser offense of voluntary  
8 manslaughter. Although Rodriguez’s trial counsel objected to the instruction as a whole, he  
9 never requested a clarifying or amplifying instruction after the court overruled that objection.  
10 By failing to timely request a clarifying or amplifying instruction, the state court held,  
11 Rodriguez had forfeited this claim. *See People v. Castaneda*, 51 Cal.4th 1292, 1348 (2011)  
12 (holding that a party objecting to an allegedly incomplete or overly general instruction must  
13 request acceptable amplifying or clarifying language, or the claim is forfeited on appeal);  
14 *People v. Geier*, 41 Cal.4th 555, 579 (2007) (same). *See Paulino v. Castro*, 371 F.3d 1083,  
15 1092–93 (9<sup>th</sup> Cir. 2004) (holding that California’s contemporaneous objection rule was an  
16 independent and adequate state law basis for denying the claim). Rodriguez has failed to  
17 establish either cause or prejudice for this.

18       The Court also notes that Rodriguez failed to exhaust this claim. To exhaust a claim,  
19 a petitioner must fairly present it to each appropriate state court, including the highest court  
20 of the state with powers of discretionary review (here, the California Supreme Court). *See*  
21 *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). The petition must alert the state court to the  
22 federal nature of the claim, such as by citing federal law or labeling the claim as federal. *Id.*  
23 at 32. But Rodriguez did not cite any federal authority to the California Supreme Court or in  
24 any other way adequately apprise that court that this claim was federal in nature. (*See*  
25 *generally* Lodgment 8 at 17–25.) He did cite federal law in his general conclusion, but only  
26 in support of another argument, that the instruction regarding a permissible inference should  
27 not have been given at all. He did not cite federal law in support of the procedurally

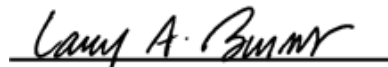
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1 defaulted claim, *i.e.*, that the jury should have been instructed that the inference could also  
2 lead them to conclude Rodriguez was guilty of voluntary manslaughter.<sup>2</sup> (*Id.* at 25–26.)

3 The Court has reviewed the R&R, finds it to be correct, **OVERRULES** Rodriguez's  
4 objections, and **ADOPTS** the R&R. The petition is **DENIED**, and a certificate of appealability  
5 is also **DENIED**.

6 **IT IS SO ORDERED.**

7 DATED: January 22, 2015

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9 **HONORABLE LARRY ALAN BURNS**  
10 United States District Judge  
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25 <sup>2</sup> Rodriguez argued that the section of the state evidence code permitting this  
26 inference was a “short-cut to conviction” that relieved the prosecution of its obligation to  
27 prove each element of the offense beyond a reasonable doubt. (Lodgment 8 at 18.) This is  
28 what his federal citation referred to. (See *id.* at 25 (“[T]he inference of Evidence Code  
section 1109 effectively creates a short-cut to a finding of guilt on what is the most serious  
of criminal charges.”) (citing the U.S. Constitution and *Carella v. California*, 491 U.S. 263,  
265 (1989)). In that claim, he argued that the instruction should not have been given at all.  
The procedurally defaulted claim, by contrast, was that this instruction should have been  
expanded to cover voluntary manslaughter as well.